IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 21

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO), An Unincorporated Labor Organization, and MICHAEL VOLK, an Individual,
Petitioners,
vs.
PAUL S. RUSSELL,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR REHEARING

(For List of Attorneys see inside front cover)

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The petitioners respectfully move for a rehearing of the opinion and judgment of this Court, rendered May 26, 1958. In so doing, we are not unmindful of the Court's general policy of denying such petitions and are taking this step only after the most considered deliberation. Nor would we take this step, were we not persuaded that the decision

sought to be reheard is of the most far reaching consequence, and raises the gravest questions concerning federal-state relations with respect to the national policy embodied in the Labor Management Relations Act, 1947.

We are persuaded, upon study of this Court's opinion in the case at bar, as well as in the companion case, *International Association, etc. v. Gonzales* (No. 31), that a majority of this Court has either denied effect to the Supremacy Clause of Article VI of the Constitution, insofar as federal regulation of labor relations is concerned, or has concluded that its reading of the Congressional intent from *Hill v. Florida*, 325 U. S. 538, to *Guss v. Utah Labor Board*, 353 U. S. 1, was incorrect. In either event the corpus of law with respect to federalism in labor relations, carefully constructed "by the process of litigating elucidation" over a span of more than a decade and resting upon a construction of the Supremacy Clause evolved in the course of more than a century, has now been mutilated beyond recognition, to the serious detriment of a comprehensively and studiously designed national labor policy and the confusion of the bar practicing in this field.

It had been well settled, we understood, that when Congress, in the exercise of one of its constitutional powers, enters upon a field of regulation, that mode of regulation and the specification of federal remedies is to the exclusion of all others (*Huston v. Moore*, 5 Wheat. 1, 21-23; *Charleston and Carolina R. R. v. Barnville Co.*, 237 U. S. 597, 604; *Missouri Pacific R. R. Co. v. Porter*, 273 U. S. 341, 345; *Cloverleaf Butter Co., v. Patterson*, 315 U. S. 148, 156; *Switchman's Union v. National Mediation Board*, 320 U. S. 297, 301); that an administrative remedy established by Congress must be exhausted prior to resort to the courts (*Aircraft and Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752, 767, 768); and that traditional common law

rights of action for damages, elements of damage, and other rights of action are excluded by provision of other remedies by Congress (*Southern Express Co. v. Byers*, 240 U. S. 612; *Western Union Telegraph Co. v. Speight*, 254 U. S. 17; *Texas and Pacific R. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Slocum v. Del, L. & W. R. R. Co.*, 339 U. S. 239; *Railway Conductors of America v. Southern Rwy. Co.*, 339 U. S. 255; *Buster v. Chicago, Milwaukee, St. Paul and Pacific R. R. Co.*, 195 Fed. 2d 72).

The foregoing principles, generally stated, are that where Congress has taken a field in hand and indicated the substantive and adjective law for its regulation, the states may not regulate the same field in duplication or complementation of, or in opposition to, the federal law.

It had also been well settled, we understood, that the substantive and procedural provisions of the National Labor Relations Act were "pre-emptive" in character in accordance with these long established principles. "The Court has ruled that a State may not prohibit the exercise of rights which the federal act protects." "A state may not enjoin under its own labor statute conduct which has been made an 'unfair labor practice' under the federal statutes." "The federal Board's machinery for dealing with certification problems also carries implications of exclusiveness." (*Weber v. Anheuser-Busch*, 348 U. S. 468, 474, 475, 476; *Garner v. Teamsters Union*, 346 U. S. 485.) The only exceptions to the exclusive character of federal substantive and procedural law which prior to the decision in this case appear to have been recognized were the continuing authority of the states to exercise historic powers[1] to deal

[1] In this connection, we have been unable to find authority for the principle that court made tort law represents exercise of the state's police power. And even if the view were accepted that punitive damages are regulatory, they were assessed in this case to prohibit conduct substantially similar to that which it was held in *Youngdahl v. Rainfair, Inc.*, 355 U. S. 131, the state court could not prohibit by injunction.

with local problems such as the regulation of traffic and preservation of the peace (*Allen-Bradley v. W. E. R. B.*, 315 U. S. 740; *U. A. W. v. W. E. R. B.*, 351 U. S. 266), the authority of the states to regulate conduct not subject to federal regulation at all (*International Union v. W. E. R. B.*, 336 U. S. 245), and the power of the states to award compensatory relief on the basis of state law to employers in cases where their rights were not protected by federal law, either substantive or remedial (*United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656). Apart from these exceptions, we had thought it to be plain that conduct subject to federal regulation, either by protection or prohibition, with federal procedures designated to remedy interferences with such federal rights, was not subject to exercise of state power either "in coincidence with, as complementary to, or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction" (*Missouri Pacific R. R. Co. v. Porter*, 273 U. S. 341).

But now we are told by the Court that the states *have* jurisdiction to entertain a tort cause, by an employee, even though it involved alleged conduct prohibited by the federal Act and subject to the federal Labor Board's remedial authority (which is assumed by this Court to include authority to award lost pay). The "possibility that both the Board and state courts have jurisdiction" is said to make no difference, and the fact that one forum might award back pay and the other not, is said to create "no conflict". The federal remedy is characterized as a "partial alternative"—a strange description of a federal procedure in earlier cases held to have been supreme and ex-

clusive.[2] We are told that the existence of a state cause of action in small part not subject to federal regulation (as was true in the *Gonzales* case, though not in *Russell*) empowers the state to engage in a wholesale invasion of the federal labor policy, and adjudicate as to federal unfair labor practices (however characterized) in exercise of "comprehensive" powers of equity.

This, of course, undermines the entire concept underlying a comprehensive federal scheme of labor relations, with a national agency empowered to make judgment as to interrelating rights and duties of employees, employers, and unions. The thrust of this concept, as it had been previously understood, is that the National Labor Relations Board is the tribunal charged by Congress with the power and responsibility of passing judgment *in the first instance*, upon these complex and delicate inter-relationships. Whatever its merits, the Congress decided that *this*, as a matter of national policy, was the effective method of regulating these inter-relationships. Any holding which takes the power of judgment *in the first instance* from the National Labor Relations Board, to that extent deviates from the overall regulatory scheme. We had understood it to have

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[2] If the reason for the Court's holding was that the federal remedy is inadequate this, we suggest, is a matter for the Congress, not the Court. It is no answer to the argument that the piling of remedy upon remedy is objectionable to say, as did the Court, that a complainant "could not collect a duplicate compensation for lost pay from the state courts and the Board". The only assurance of this can come from according exclusiveness to the federal remedy provided, unless this Court substantially alters its *certiorari* policy and agrees to hear every case where a plausible claim is made that the state has exceeded its authority by prohibiting conduct which might be protected or by awarding duplicate compensation for conduct already federally compensated. The claimed inadequacy of the federal remedy has never before been a controlling factor, as witness *Guss v. Utah Labor Board* and companion cases where, because of NLRB jurisdictional policies there was, in practical terms, no federal remedy at all.

been the conclusion of this Court that only in cases of claimed breaches of the peace were the states authorized, because of their immediate interest in matters of such "genuine local concern" (351 U. S. 274) to exercise a judgment in the first instance, even though the conduct involved was also subject to federal regulation. As was said in *Garner* and *Weber:* "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." "* * * [W]here the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance."

Now, however, the Court has made a complete turnabout from this general approach. For, although there is no question that the Congress has protected the right to engage in concerted activities, and has invested the National Labor Relations Board with authority to decide when this right has been exceeded to the extent of interfering with and restraining employees in their corollary right to re-

frain from these activities, the decision of the Court permits parallel regulation and policy determination concerning these rights to be made by the state courts. The existence and exercise, hence, of federally protected rights is entrusted to the vicissitudes of state courts and juries.

One consequence of this is to make this Court the sole arbiter of the question of whether or not *under the facts* federal rights have been denied. In other words, the Supreme Court of the United States becomes the only federal agency which will have an opportunity to review the questions of federal right presented under factual issues, and, therefore, must assume the responsibility delegated by Congress to the National Labor Relations Board to insure uniformity in the exercise of labor activity and the protection of employee rights in interstate commerce. Under the authority of *Creswill v. Grand Lodge*, 225 U. S. 246, 261; *Fisk v. Kansas*, 274 U. S. 380, 385, 386, and *Sterling v. Constantin*, 287 U. S. 378, 398, this Court will review facts concerning an alleged denial of federal rights where it is contended that a finding has been made which was without evidence to sustain it, or where the consideration of evidence is necessary to a determination of a federal question. Thus, in every case of this character the question of the sufficiency of the evidence to sustain a limitation of a federal right, and the question of whether or not federal rights were denied under the evidence, will be presented to this Court, which will therefore, be compelled to review such cases on the facts. This is a function which should be exercised, and was intended to be exercised by the Labor Board, and which should not devolve upon this Court.

The difficulties of such factual review are well illustrated by this case where the Court undertook to review the evidence and found "the jury could have found that

work would have ben available within the plant if Russell, and others desiring entry, had not been excluded by the force, or threats of force of the strikers." As in the case of the Supreme Court of Alabama, this Court failed to cite any fact which would indicate, or tend to indicate, that work would have been available, or that the employer wished Russell to enter and work during the strike, if he had been permitted to do so. To the contrary, the Court's finding of fact further recites the inconsistent determination that after the strike began Russell "during the next five weeks * * * kept in touch with the unchanged situation at the plant entrance, and set about securing signatures to a petition of enough employees, who wished to resume the work, *to operate the plant.*" This required over two hundred signatures, and there was no showing that a lesser number of employees would have been sufficient to have operated the plant and to have made work available to him.[3]

In reaching the determination first quoted, this Court, as did the Alabama Supreme Court, overlooked the long line of authority which accords with the general rule, that in cases of interference with employment, an individual cannot recover damages unless he sustains the burden of showing that work would have been available to him where he is employed by the hour and at will, especially where the means used is obstruction of a public street where he must show damages differing not in degree, but

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[3] On the facts adduced in the trial of this cause Russell, although not desiring to strike, would have lost wages because of the employer's inability to operate, irrespective of the presence or absence of the picket-line for the record is plain that the strike at the outset was overwhelmingly supported by the employees. The decision of this Court consequently exposes to the hazards of litigation a lawful economic strike engaged upon by most of the employees involved who may, or may not, at the commencement of their strike, to demonstrate their support of it, assemble *en masse* in front of their work premises.

in kind from those which result to the public generally. Prosser, *Torts*, §106 (2d Ed. 1955); *Walks v. C. D. Smith & Co.*, 167 Ala. 138, 52 So. 320; *Ex Parte Ashworth*, 204 Ala. 391, 86 So. 84; *Birmingham Railway Light and Power Co. v. Smyer*, 181 Ala. 121, 61 So. 354; *Cassimus v. Levystein*, 176 Ala. 365, 58 So. 280; *Duy v. Alabama Western R. R. Co.*, 175 Ala. 162, 57 So. 724; *Weiss v. Taylor*, 144 Ala. 440, 39 So. 519; *Russell v. Holderness*, 216 Ala. 95, 112 So. 309; *Horton v. Southern Rwy. Co.*, 173 Ala. 231, 55 So. 531; *First Avenue Coal etc., Co. v. Johnson*, 171 Ala. 470, 54 So. 598. (See footnote, page 28, our brief.)

The consequences of this approach generally to the policy goal of nationally uniform regulation of labor relations should be plain on its face, as should the risks which it attaches to any assayed exercise of federally protected rights. Each such exercise, it may be anticipated, will be subjected to harassing ligitation with local results dependent upon local sentiment and local law, and with the National Labor Relations Board, theoretically the tribunal charged with administering a federal labor policy, mostly by-passed in its role as a "partial alternative". Certainly, the power of the states to regulate by punitive damages spells the end of uniformity in the exercise of federal rights of employees to engage in concerted activity, and seriously jeopardizes organizational efforts in those sections of the country where economic circumstances most urgently require bargaining strength for the benefit of the economy as a whole. Such compartmentalized regulation in an economy increasingly characterized by corporations and labor organizations whose scope and activities are plainly national in scope is shockingly unrealistic and incongruous.

The scope of the Court's holding in this case, as is attested to by the wide publicity it has received, is inestimable. The Chief Justice in his dissent asks: "Must we assume that the employer who resorts to a lockout is also subject to a succession of punitive recoveries at the hands of his employees?" To this we would add: Suppose an employee alleges a peaceful but tortious interference with his right to work which also constitutes 8 (a)(3) and 8 (b)(2) violations of the federal act and seeks injunctive and compensatory relief. Does the existence of an historic or newly developed state policy (legislative or judicial) with respect to such a claim give the states jurisdiction to duplicate or add to the federal remedy? Suppose the employee decides he prefers the state remedy because it is speedier or more comprehensive? Is the federal remedy merely one to be invoked at the employee's option? Is the likely possibility of a difference in results before the two forums no conflict or is it not precisely the sort of conflict which the pre-emption doctrine is designed to avoid? Conceivable it is that an 8 (a)(3) violation on the part of an employer is not a tort whereas an 8 (b)(2) violation on the part of the union is. Or suppose that employees strike in the face of a contractual no-strike pledge but to protest their employer's serious unfair labor practices. The hairline questions which arise over whether such conduct is protected by the federal Act are well illustrated by the case of *Mastro Plastics Corp., v. N. L. R. B.*, 350 U. S. 270. Under the decision in this case, could employees disapproving of such a strike sue for interference with their employment relationship if the strike successfully closes the plant down, even though under the federal law the strike would be protected notwithstanding it to be in breach of the labor contract? It is plain that the state court and jury would be making findings of fact and law with respect to federal rights and

duties, notwithstanding the common law posture of such litigation. That these questions are not theoretical is evidenced by *Teamsters v. Selles*, 214 P. 2d 456, cert. den'd 26 Law Week 3352 (No. 649 this Term). We do not believe it to have been the Congressional intent, in enacting comprehensive federal labor legislation with federal machinery for administration, to have the right to relief continue to depend upon the vagaries of varying state law as they developed historically.

We respectfully urge the Court to grant this petition for a rehearing.

Respectfully submitted,

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CERTIFICATION

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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